90-1487

No. (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,
Petitioner,

vs.

HARVEY G. MORTS, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436

In the Matter of the
Complaint of Three Buoys
Houseboat Vacations U.S.A.
Ltd., as owners of one 1977
Chriscraft 20' fiberglass
vessel, Vessel No. Mo-3136-AT,
for exoneration from or
limitation of liability,
Appellant,

v.

Harvey G. Morts,
Appellees.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: March 15, 1989
Filed: December 21, 1990

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

After our original opinion in this case, *Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 878 F.2d 1096 (8th Cir. 1989), was decided, the Appellant applied for certiorari. The Supreme Court granted certiorari, vacated the opinion, and remanded the case for our consideration in view of *Sisson v. Ruby*, 110 S. Ct. 2892 (1990). *Three Buoys Houseboat Vacations U.S.A., Ltd. v. Morts*, 110 S. Ct. 3265 (1990).

We have examined *Sisson* and its Seventh Circuit antecedent, *In re Complaint of Sisson*, 867 F.2d 341 (7th Cir. 1989), and reexamined this case. We find no reason to alter our earlier judgment, except to the extent that it can be said to have relied on the Seventh Circuit's opinion in *Sisson*, which has been reversed.

I. BACKGROUND

Three Buoys (the Appellant) is in the business of chartering houseboats on the Lake of the Ozarks in Missouri. In the early morning hours of August 2, 1987, a service vessel of Appellant's was sent out on a service call to one of its chartered houseboats. En route, the service boat struck a houseboat that was not chartered from Appellant. Two passengers on the stricken houseboat were killed, three others incurred personal injuries, as did one of Appellant's employees. The Appellant's service vessel sank.

Various claims for wrongful death, personal injury, and property damage were filed against the Appellant and its sunken vessel in the state courts of Missouri. Seeking to avoid full liability, Appellant petitioned the district court[1] for the protections of the Limitation of Liability Act, 46 U.S.C. App. §§ 181 et seq. (the Act).[2] The Act would allow recovery against the appellant only in the amount of the salvage value of Appellant's vessel (likely nothing, as it lies at the bottom of Lake of the Ozarks) or $420 per ton. 46 U.S.C. App. 183(b) (1988).

The district court concluded that it lacked admiralty jurisdiction, but found that it had jurisdiction under general federal question jurisdiction. However, it ultimately dismissed Appellant's petition for failure to state a claim. The district court found that the Act could only

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[1] The Honorable John F. Nangle, Chief United States District Judge for the Eastern District of Missouri. The published opinions of the district court are at 689 F. Supp. 958 (E.D. Mo. 1988) and 691 F. Supp. 182 (E.D. Mo. 1988). Judge Nangle has since assumed senior status.

[2] For a discussion of the traditional scope and purpose of the Act see *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417-18 (8th Cir. 1979).

support claims arising from navigable waterways and that the Lake of the Ozarks was not navigable. Thus, the Appellant had not stated a claim. We affirm the district court, but find no subject matter jurisdiction. We again conclude that neither this court nor the district court had jurisdiction under admiralty jurisdiction, federal question jurisdiction, or the Act to entertain this suit.

II. DISCUSSION

A. *SISSON*'S IMPACT

Admiralty jurisdiction as to torts requires locality (the situs of the waterway) and nexus (the status of the vessel or activities). Locality is satisfied by a navigable waterway, while nexus is satisfied by a sufficient relationship of the vessel to maritime activities. *See Sisson*, 110 S. Ct. at 2895. While this case and *Sisson* both concern admiralty jurisdiction in the federal courts, each addresses a different aspect of that jurisdiction. Most importantly, they involve two very different waterways: *Sisson* involved Lake Michigan, indisputably a navigable waterway; this case involves the Lake of the Ozarks in Missouri, which we view as not a navigable waterway.

Further, while *Sisson* delineates admiralty's nexus requirement by explaining the meaning of maritime activities on navigable waterways, it says nothing about what actually constitutes a navigable waterway. That Lake Michigan is a navigable waterway is beyond doubt and was not discussed by the Court. The Lake of the Ozarks, however, is another cup of tea. This case turns only on the question of whether that lake is a navigable waterway for admiralty jurisdiction purposes.

In that regard, the Appellant t has urged upon us the Supreme Court's language from *Sisson* to the effect that navigation is not required to establish a connection to maritime activities — indeed, the vessel is *Sisson* was docked at a marina on Lake Michigan, and was not navigating. Nevertheless, the court found that the mooring of a ship on a *navigable waterway* was sufficiently related to maritime activities to trigger admiralty jurisdiction. *Sisson*, 110 S. Ct. at 2897-98. Thus, the nexus requirement has become rather easily satisfied, and rightly

so. It is the navigable waterway question (something of a given with respect to Lake Michigan) that seems more controlling and perhaps the one true determinant of admiralty jurisdiction. *See Sisson*, 110 S. Ct. at 2898-02 (Scalia, J., concurring).

Yet, the Appellant has ignored the distinction between navigation vis-a-vis the vessel and vis-a-vis the waterway. The whole significance of a waterway as navigable as a precondition to maritime jurisdiction seems lost to the Appellant. In *Sisson*, the Supreme Court said that navigation was not an essential element of the activities of the *vessel* to tie into maritime activities, but navigation as to the *waterway* was not discussed at all. While a vessel may not have to be navigating to be considered engaged in maritime activity, it must be on a navigable waterway. As Justice Scalia suggests, it is the very fact that a vessel is on a navigable waterway at all that creates maritime jurisdiction, and less so the activity of the vessel. *Id.* at 2901. Answering the question of the vessel's relationship to maritime activities does not answer the question of the waterway's status as navigable.

The two ideas are distinct — there is the waterway and there is the vessel and its activities. While the Appellant has suggested we deny this distinction and use the Supreme Court's analysis of navigation in the nexus-vessel context in our analysis of what is a navigable waterway, we cannot do so. The importance of the existence of a navigable waterway in the first instance is repeatedly brought home by the Supreme Court's recurrent use of the phrase "navigable waterway" to describe admiralty jurisdiction throughout its opinion in *Sisson*.[3] Hence, we remain confident that our inquiry must first determine if the Lake of the Ozarks is a navigable waterway. Because the Supreme court has not discussed that factor in *Sisson*, we readopt our views as expressed in the original panel opinion and briefly reiterate them below.

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[3] As noted in *Sisson*, "[t]he fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce,' [*Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)], and we have said that that interest cannot be fully vindicated unless '*all* operators of vessels on navigable waters are subject to uniform rules of conduct,' *id.*, at 675, 102 S. Ct., at 2658." *Sisson*, 110 S. Ct. at 2898.

B. NAVIGABILITY

Navigability is a term subject to different definitions depending upon the context of a case. In some cases the term has a different meaning from that expressed in admiralty cases. *See Kaiser Aetna v. United States*, 444 U.S. 164, 170-172 and n. 7 (1979); *Livingston v. United States*, 627 F.2d 165, 169-70 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); *cf. Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 621-23 (8th Cir. 1979) (defining navigable waters for purposes of certain acts of Congress). While there is ample case law describing navigability in contexts which do not concern admiralty, we are concerned with navigability only as it relates to admiralty. *Livingston* is the most complete statement from this court in that regard.

Thus, despite the criticisms expressed in *Finneseth v. Carter*, 712 F.2d 1041, 1045 (6th Cir. 1983)[4], and until the Supreme Court authority to the contrary, *Livingston* remains the controlling authority in this court for the determination of what is a navigable waterway. The standard is one of "contemporary navigability in fact." *Livingston*, 627 F.2d at 170; *see also Edwards v. Hurtel*, 717 F.2d 1204, 1205 (8th Cir. 1983) (per curiam), *opinion on rhr' g*, 724 F.2d 689 (1984) (per curiam); *cf. Goodman v. 1973 26 Foot Trojan Vessel*, 859 F.2d 71, 73 and n.3 (8th Cir. 1988) (in admiralty contract case as distinguished from admiralty tort cases, court said "[n]avigable waters have a present capacity to sustain commercial shipping.") (Citing *Livingston*, 627 F.2d at 170).

The Appellant suggests there is contrary authority from this court in *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306 (8th Cir. 1957) and *George v. Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968). We do not

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[4] *Finneseth* is not actually contrary to *Livingston*, for *Finneseth* deals with a manmade lake formed by a lockless dam, but the "Dale Hollow Lake is an interstate water body susceptible or capable of being used as an interstate highway of commerce, even though it is not presently so used, it meets the Supreme Court's requirements for navigability for admiralty jurisdiction under 28 U.S.C. § 1331(1) and 46 U.S.C. § 740." *Finneseth*, 712 F.2d at 1047.

entirely agree. Neither case directly addressed the admiralty jurisdiction question answered in *Livingston*. *Livingston*, 627 F.2d at 168 and n.4. Thus, Appellant's reliance on those cases, particularly *Loc-Wood*, cannot help answer the question of what navigability is, which question controls this case.

George contains language to the effect that if a river was navigable prior to the construction of a dam, it is thereafter still considered to be a navigable waterway. *George*, 402 F.2d at 978. That language, however, is dictum and did not control on the real question necessary for resolution of the case: whether float fishing on the stream in question constituted commerce as to make the stream navigable. *Id.* To the contrary, the *George* court actually used the navigability in fact test to reach its conclusion that float fishing alone did "not render the stream navigable in fact[.]" *Id.* at 981. Further, *George* pointed out that the navigability in fact standard is an old one, dating back to *The Daniel Ball*, 77 U.S. (10 Wallace) 557 (1870).

> 'The test of navigability has frequently been stated by this Court. In the Daniel Ball . . . the Court said: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." '

George, 402 F.2d at 980 (quoting *United States v. State of Utah*, 283 U.S. 64, 76 (1931) (quoting *The Daniel Ball*, 77 U.S. (10 Wallace) at 563)). Thus, *George* and *Livingston* are not inconsistent. The latter is in some sense simply a more recent statement of the law expounded upon in the former. But *Loc-Wood* is a more troublesome case.

Loc-Wood makes the unequivocal statement that the Lake of the Ozarks is a navigable waterway. *Loc-Wood*, 245 F.2d at 307. However, *Loc-Wood* did not directly decide the question of what is navigable and what is not and only summarily addressed the issue. The precedents on which it relies say only that navigable waterways are within the admiralty jurisdiction of the federal courts, but say nothing

of what is navigable and what is not. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 41 (1942); *The Propeller Genesee Chief of Fitzhugh*, 53 U.S. (12 How.) 443, 456-57 (1851). Nevertheless, the clear statement that the Lake of the Ozarks is navigable remains an obstacle to the decisionmaking necessary to this case. And while *Georgia* and *Livingston* could apply the correct standard of navigability without facing that language because those cases dealt with other waterways, we cannot apply the correct standard without squarely facing down *Loc-Wood*'s conclusion as to the Lake of the Ozarks.

This court is back on the same body of water, but now rides the waves of intervening precedent. To the extent that *Loc-Wood* is in conflict with *Livingston*, we are faced with a choice of precedent. We follow *Livingston* as the better reasoned authority. *Loc-Wood* did not discuss the relevant (or any) legal standards on navigability later discussed by this court in *George* and *Livingston*. Our conclusion, with the advantage of hindsight and *Livingston*'s authority, is that *Loc-Wood* was wrongly decided. To the extent that it is inconsistent with *Livingston*, is precedent for the proposition that the Lake of the Ozarks is a navigable waterway, and for the reasons discussed below, *Loc-Wood* is expressly overruled.[5]

Thus, we are faced with deciding whether the Lake of the Ozarks is a navigable waterway under *Livingston*'s navigable in fact standard. We conclude that it is not for two related reasons. First, the Lake of the Ozarks is not navigable in fact because of the existence of the Bagnell Dam. Neither the possibility of future navigation in the event the Army Corps of Engineers removes the dam nor the prior alleged navigability of the Osage River before the existence of the dam alters the present facts. The lake cannot be negotiated past the dam. *Present* navigability is the standard, and present navigability, as we construe it for admiralty and like purposes, is not possible on the Lake of the Ozarks. Second, we conclude that the purely intrastate shipping which can be maintained on the lake, which is located entirely in the State of Missouri,

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[5] As a matter of court procedure, a panel cannnot overrule a prior panel opinion of this court. For that reason, this opinion has been circulated to the court *en banc*, and the court *en banc* has approved it.

is insufficient to make it a navigable waterway for interstate commerce purposes to sustain admiralty jurisdiction in the federal courts.[6] No jurisdiction lies under 28 U.S.C. § 1333 (admiralty, maritime, and prize cases).

Likewise, we conclude that the Act does not create independent jurisdiction in the federal courts by "arising under" federal law under either 28 U.S.C. § 1331 (federal question) or § 1337 (commerce, et al.) (1988). Federal question jurisdiction is not created by the existence of the Act. The Act is really in the nature of a defense, it did not create Appellees' causes of action for personal injury and wrongful death against Appellant. The laws of Missouri are the source of those causes of action; while here the Appellant is attempting to misuse the Act to defeat what could be liability coupled with substantial damages, without the redeeming feature of encouraging maritime commerce on the high seas and navigable waterways. No independent federal question jurisdiction lies because of the Act. Further, the failure of navigability on the Lake of the Ozarks for purposes of maritime law submarines the theory of the Appellant's that the Act can create independent federal question jurisdiction for the reasons discussed below.

Finally, the Act's reach is only coextensive with that of the admiralty jurisdiction. Where admiralty jurisdiction fails for want of a navigable waterway, so does the reach of the Act. Thus, even if the Appellant discovered an independent basis for subject matter jurisdiction, it still would not be afforded the protection of the Act because the Act does not apply beyond navigable waterways. While the Act was

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[6] As to commerce, we reiterate what was first said in *George*.

> We have mentioned the trend toward liberality in the treatment of admiralty jurisdiction but we are wary of the unnecessary extension of any rule on navigability, particularly when it could well lead to *absurdity*. There are many fishing streams [and recreational lakes] throughout the country which are not usable as highways for commerce or transportation in the *customary mode*.

George, 402 F.2d at 981 (emphasis added).

amended to include vessels on inland lakes and streams, the clear intent was to include only those in navigation. *See* 46 U.S.C. § 188 (1988). The Lake of the Ozarks is not a navigable waterway for purposes of admiralty jurisdiction and thus is not navigable for purposes of the Act.

Our conclusions, now as before, are wholly consistent with the purposes of maritime jurisdiction. Maritime jurisdiction is designed to protect and promote maritime commerce by the application of uniform rules on navigable waterways. *See Sisson*, 110 S. Ct. at 2898. In the absence of a navigable waterway, there is obviously no need or authority to exercise admiralty jurisdiction or any other federal jurisdiction to give the Act reach beyond its maritime underpinnings.[7]

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[7] In fact, the application of maritime law on the Lake of the Ozarks would do nothing to promote certainty and uniformity of maritime law for those vessel operators who are elsewhere engaged in maritime commerce. To the contrary, it would no doubt come as quite a surprise to the many recreational boaters on the lake that they are part of maritime commerce subject to admiralty jurisdiction on a non-navigable body of water. *See* note 6.

We, of course, do not suggest that the character of the vessel is determinative. In *Sisson*, the vessel was a pleasure yacht. *See also Matter of Guglielmo*, 897 F.2d 58 (2nd Cir. 1990) (21-foot motorboat towing waterskier in bay off Long Island shore within Limitation of Liability Act); *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225 (11th Cir. 1990) (jet ski in waterway off Key West, Florida, within Limitation of Liability Act); *St. Hilaire Moye v. Henderson*, 496 F.2d 973, 979 (8th Cir.), *cert. denied*, 419 U.S. 884 (1974) (admiralty law does not apply only to vessels in commerce). It is the character of the waterway that first must be decided. If the waterway in question is not navigable for admiralty purposes, it makes little difference what craft sets sail.

III. CONCLUSION

Because the Lake of the Ozarks is not a navigable waterway, the facts of this case do not allow for federal jurisdiction under admiralty, federal question, or the Limitation of Liability Act. For all the foregoing reasons, we hold that the Appellant's complaint should be dismissed for want of jurisdiction, and it is so ordered.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436

In the Matter of the Complaint of Three Buoys Houseboat Vacations, U.S.A., Ltd., etc.,

Appellant,

v.

Harvey G. Morts, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: March 15, 1989
Filed: July 5, 1989

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Three Buoys Houseboat Vacations, U.S.A., Ltd. [hereinafter Three Buoys] appeals an order of the district court[1] which dismissed its Complaint for Exoneration from or Limitation of Liability filed under the Limitation of Liability Act, 46 U.S.C. App. §§ 181 *et seq.* (Supp. I 1983). A service vessel owned by Three Buoys was involved in a

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[1] The Honorable John F. Nangle, Chief United States District Judge for the Eastern District of Missouri. The district court's opinion is published at 689 F. Supp. 958 (E.D. Mo. 1988).

collision with a houseboat on the Lake of the Ozarks, in the state of Missouri. Three Buoys filed its complaint in the district court seeking the protection provided under the Limitation of Liability Act. The district court rejected Three Buoys' assertion of admiralty jurisdiction as a basis for subject matter jurisdiction. The district court, however, concluded that it had subject matter jurisdiction under its general federal question jurisdiction. On the merits, the district court determined that the Limitation of Liability Act only applies to vessels which are used on "navigable" waterways as that term is defined for purposes of admiralty jurisdiction. The court also concluded that the Lake of the Ozarks was not navigable for this purpose. Accordingly, the district court dismissed Three Buoys' complaint for failure to state a claim. We affirm the decision of the district court.

I. BACKGROUND

On August 2, 1987, a service vessel owned by Three Buoys collided with a houseboat on the Lake of the Ozarks.[2] The Lake of the Ozarks is a large reservoir which was created when the Army Corps of Engineers constructed the Bagnell Dam impounding the Osage River. The Bagnell Dam has no locks which allow the passage of vessels. The lake created by the dam is now a popular recreational area for many Missourians and tourists. The lake is located entirely within Missouri.

The collision occurred at approximately 2:00 a.m. and resulted in the deaths of two passengers on the houseboat. Three other passengers on the houseboat and a Three Buoys employee on its service vessel sustained personal injuries. Several claims for wrongful death, personal injury, and property damage have been filed against Three Buoys and its vessel in the Missouri state courts.

Three Buoys filed its complaint in the district court seeking the protections provided under the Limitation of Liability Act, 46 U.S.C.

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[2] Three Buoys is engaged in the business of chartering houseboats on the Lake of the Ozarks. The service vessel involved in the collision was sent out to service a houseboat chartered by Three Buoys. The other vessel involved in the collision was a houseboat, although not Three Buoys' houseboat.

app. §§ 181 *et seq.* Three Buoys maintains that the district court had subject matter jurisdiction pursuant to three federal statutes. The first, 28 U.S.C. 1333, gives district courts subject matter jurisdiction to hear admiralty cases. The two remaining statutes, 28 U.S.C. §§ 1331, 1337, give the district courts subject matter jurisdiction to hear cases involving federal questions and cases arising under an act of Congress regulating commerce, respectively.

II. DISCUSSION

A. Subject Matter Jurisdiction

We begin our analysis by determining the basis for the district court's, and hence this court's, subject matter jurisdiction. As already noted, Three Buoys maintains that subject matter jurisdiction is proper pursuant to three statutes, 28 U.S.C. §§ 1333, 1331, and 1337. We will review each of these statutes to determine whether they provide a basis for subject matter jurisdiction.

Subject matter jurisdiction over admiralty cases is conferred by 28 U.S.C. § 1333 which provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333 (1982).

In the early admiralty cases the extent of admiralty jurisdiction over maritime torts was determined exclusively through a locality test, *i.e.*, whether the tort occurred on navigable waters. In 1972, however, the Supreme Court added a nexus requirement for purposes of determining admiralty jurisdiction. In *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972), the Supreme Court held that in order to come within the court's admiralty jurisdiction a tort must "bear a significant relationship to traditional maritime activity." We need not reach the nexus requirement in the present case because we

conclude that the collision on the Lake of the Ozarks at issue in this appeal fails the locality requirement of admiralty jurisdiction.

As already noted, it is well settled that admiralty jurisdiction only extends to torts which occur on "navigable" waters. *Id.* at 253, 93 S.Ct. at 497. Therefore, we must determine whether the Lake of the Ozarks is navigable as that term is used in the context of admiralty jurisdiction.

In *Kaiser Aetna v. United States*, 444 U.S. 164, 171-72 (1979), the Supreme Court noted some of the conflicting definitions that are often applied by the lower courts in determining whether a waterway is navigable. The confusion was attributed primarily to the four distinct purposes underlying the term "navigability" as set forth in *Livingston v. United States*, 627 F.2d 165, 169 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) which are:

> to delimit the boundaries of the navigational servitude; to define the scope of Congress' regulatory authority under the commerce clause; to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Act of 1899; and to establish the limits of federal admiralty jurisdiction. Each of these areas of the law might well require a different definition of 'navigability.'

Three Buoys argues for an expansive definition of navigable which, of course, would include the Lake of the Ozarks within its definition. In *Loc-Wood Boat & Motors v. Rockwell*, 245 F.2d 306, 307 (8th Cir. 1957), a case with facts somewhat similar to the instant case, this court stated: "The Lake of the Ozarks was created by the Bagnell Dam in the Osage River. The lake is entirely within the state of Missouri, but is navigable water within the admiralty and maritime jurisdiction of the United States." *See also George v. Beavark, Inc.*, 402 F.2d 977, 978 (8th Cir. 1968) ("If the river was navigable prior to construction of the dam, it continues to be considered as a navigability stream."). Three Buoys argues that because the Osage River was historically a navigable waterway prior to the construction of the Bagnell Dam, it retains its navigable waterways status notwithstanding the construction of the dam which prevents interstate travel on the Osage.

While *Loc-Wood Boat & Motors* and *George v. Beavark, Inc.* seem to provide strong support for Three Buoys' contentions, those cases were later disapproved in *Livingston v. United States*. In *Livingston*, this court suggested that navigability is not a static concept and once a waterway is found to be navigable this does not preclude a subsequent finding of nonnavigability due to a change in circumstances.

> The history of commercial traffic on the river, whatever is intrinsic interest, does not determine the scope of present-day admiralty jurisdiction. *Notwithstanding any expression to the contrary in prior decisions of this court, federal admiralty jurisdiction turns on contemporary navigability in fact.*

Livingston v. United States, 627 F.2d at 170 (emphasis added).

In *Livingston* this court indicated that the closing of waters to commercial shipping should have the effect of eliminating admiralty jurisdiction over them. *Id.* at 169. Accordingly, this court held the "concept of 'navigability' in admiralty is properly limited to describing a present capability of waters to sustain commercial shipping." *Id.* at 169-70. When this definition of navigability is applied to the facts before us it is clear that the Lake of the Ozarks, as found by the district judge, is not a navigable waterway for purposes of admiralty jurisdiction.

Because of its large size the Lake of the Ozarks is capable of sustaining commercial shipping. Nevertheless, in order to qualify as a navigable waterway for admiralty purposes we hold that purely intrastate commercial shipping is not enough. Navigability for this purpose requires interstate or foreign commercial shipping. The federal admiralty jurisdiction is founded upon the need for a uniform body of governing law with respect to navigation and commercial maritime activity. Applying uniform rules in admiralty prevents those engaged in interstate and foreign shipping from being subjected to conflicting rules of law. Such a concern is not present in the context of purely intrastate commercial shipping because only one body of law will necessarily apply and shippers will not be subjected to conflicting legal rules. Therefore we hold that the Lake of the Ozarks is not a navigable waterway and the district court properly declined to exercise its admiralty jurisdiction over this dispute.

Our decision is controlled by the *Livingston* case. At oral argument Three Buoys urged this panel to reject the reasoning of the *Livingston* case and apply a different definition of navigability. We, of course, cannot do this. A panel of this court is not at liberty to disregard prior panel decisions even when the panel may disagree with the reasoning of existing decisions. Unless intervening Supreme Court precedent has cast doubt on the reasoning of existing circuit authority, we must apply the body of circuit law that exists when we decide a given case. Only this court sitting *en banc* can disagree with or reject existing circuit authority.

The next bases for subject matter jurisdiction asserted by Three Buoys are 28 U.S.C. §§ 1331 and 1337. Both of these statutes require the cause of action over which jurisdiction is asserted to have "arisen under" federal law. The district court concluded that it had subject matter jurisdiction "pursuant to 28 U.S.C. §§ 1331 and 1337, over this limitation proceeding which arises under an Act of Congress regulating commerce." 689 F. Supp. at 963. We disagree with this conclusion.

Our research has not turned up any other case in which subject matter jurisdiction over a Limitation of Liability Act proceeding has been based on either section 1331 and 1337 in the absence of admiralty jurisdiction. The Limitation of Liability Act has been considered by the federal courts for almost one hundred-fifty years, yet no reported decisions have concluded that jurisdiction for such a claim may be premised under either section 1331 or 1337. This in itself is persuasive evidence that there is a flaw in Three Buoys' contentions.

We do not believe that either of these statutes confers jurisdiction on the district court because this case arose under state tort law and cannot be said to have arisen under the Limitation of Liability Act as argued by Three Buoys. In discussing whether a cause of action arises under federal law the Supreme Court recently noted that "[t]here is no 'single, precise definition' of that concept; rather, 'the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.' " *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S.

804, 808 (1986) (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 (1983)).

The Court noted, however, that "[t]he 'vast majority' of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a ' "suit arises under the law that creates the cause of action" ' " *Merrell Dow Pharmaceuticals*, 478 U.S. at 808 (quoting *Franchise Tax Board*, 463 U.S. at 8-9 (quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916))). This test, when applied to the instant facts, further supports our conclusion that this is not a case that arises under federal law. If a suit arises under the law that creates the cause of action then undoubtedly this case would arise under state law because it is state tort law that created the cause of action and defines the rights and obligations of the parties. Because the instant case does not fall within the court's admiralty jurisdiction and it is not a maritime tort it will be resolved according to Missouri state law. The fact that this case involves an issue of federal law does not alter our conclusion. There is a "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharmaceuticals*, 478 U.S. at 813 (footnote omitted). Thus, Three Buoys' assertion of limited liability under the Limitation of Liability Act does not make this a case "arising under" federal law.

We recognize that Justice Holmes' test for determining the extent of federal jurisdiction is more useful as a test for inclusion rather than exclusion. Nevertheless, our holding is also consistent with the proper management of the federal judicial system. In *Merrell Dow Pharmaceuticals*, the Court reemphasized that "in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." 478 U.S. at 810.

We also note that the Limitation of Liability Act is more akin to a defense. In this regard the following language taken from the *Merrell Dow Pharmaceuticals* case seems especially apposite: "Under our longstanding interpretation of the current statutory scheme, the question whether a claim 'arises under' federal law must be determined by

reference to the 'well-pleaded complaint.' * * * *A defense that raises a federal question is inadequate to confer federal jurisdiction.*" 478 U.S. at 808 (quoting *Franchise Tax Board*, 463 U.S. at 9-10).

In *Franchise Tax Board* the Supreme Court discussed its earlier decision in *Skelly Oil Co v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). The Court noted that "*Skelly Oil* has come to stand for the proposition that 'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.' " *Franchise Tax Board*, 463 U.S. at 16 (quoting 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2767 (2d ed. 1983)). In *Skelly Oil*, the Court concluded that the Declaratory Judgment Act was not a jurisdictional statute and it did not extend the jurisdiction of the federal courts. 339 U.S. at 671-72. The Declaratory Judgment Act was found to be procedural and did not supply a new basis for subject matter jurisdiction.

In the instant case we are confronted with a similar statute. Two circuits have very recently concluded that the Limitation of Liability Act does not provide an independent source of subject matter jurisdiction. *See Lewis Charters, Inc. v. Huckins Yacht Corp*, 871 F.2d 1046 (11th Cir. 1989); *In the Matter of Sisson*, 867 F.2d 341, 348-49 (7th Cir. 1989). In *Lewis Charters*, the Eleventh Circuit stated the issue before it was whether a claim "incapable of invoking admiralty jurisdiction under section 1333 is, nonetheless, cognizable in the federal court under the Limitation of Liability Act." 871 F.2d at 1052. The Court answered this question in the negative. *Id.* at 1054. While the Limitation of Liability Act provides a defense to shipowners in certain admiralty cases, it never extended the jurisdiction of the federal courts. We conclude that if but for the availability of the Limitation of Liability Act procedure the federal claim would arise only as a defense to a state tort claim, jurisdiction is lacking.

Accordingly, we hold that subject matter jurisdiction is not conferred under 28 U.S.C. §§ 1331 or 1337 because Three Buoys' complaint does not "arise under" federal law for purposes of these jurisdiction statutes. Furthermore, whether a complaint under the Limitation of Liability Act "arises under" federal law in the absence of

admiralty jurisdiction is primarily a question of mere academic interest. Because, as we discuss later, the Limitation of Liability Act's territorial application is coextensive with the territorial reach of admiralty jurisdiction, the courts will never be faced with a case in which admiralty jurisdiction is lacking yet the Limitation Act will apply. Thus, Three Buoys has nothing to gain by persuading us that this case "arises under" federal law and is thus within our federal question jurisdiction.

B. Merits

Finally, aside from the fatal jurisdictional defect, Three Buoys would not be entitled to the relief it seeks on the merits. Three Buoys is trying to limit its liability for the collision involving its service vessel and a houseboat on the Lake of the Ozarks.

The Limitation of Liability Act provides in pertinent part: "The liability of the owner of any vessel * * * for any loss, damage, or injury by collision * * * incurred without the privity or knowledge of such owner * * * shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. app. § 183(a) (Supp. I 1983).

If the Act applies to the present case Three Buoys may escape liability for the wrongful deaths, personal injury, and property damage caused by its vessel. Under the Act the owner of a vessel may limit his liability to the value of the vessel and its freight at the conclusion of its voyage. In the present case Three Buoys' vessel is lying at the bottom of the lake and it has no value. Accordingly, if we find the Act to apply the claimants will be deprived of any remedy for Three Buoys' wrongs.[3]

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[3]Several cases have recently espoused a very unfavorable judicial attitude towards the Limitation of Liability Act. The Act is considered by many to be outmoded and the reasons for which the Act was passed have largely been replaced by the use of corporate organization and the availability of insurance. *See, e.g., Esta Later Charters, Inc. v. Ignacio*, 875 F.2d 234 (9th Cir. 1989).

Prior to its amendment, the Limitation of Liability Act did not "apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation." Limitation of Liability Act, Ch. 43, § 7, 9 Stat. 635, 636 (1851). Three Buoys argues that because the Limitation of Liability Act was amended in the late 1800's to apply to "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." Amendment to the Limitation of Liability Act, Ch. 421, § 4, 24 Stat. 79, 81 (1886), it must necessarily apply to vessels operating on the Lake of the Ozarks. Three Buoys misconstrues the nature of this amendment. This amendment was not intended to extend the territorial reach of the Limitation of Liability Act beyond the reach of admiralty and maritime jurisdiction. The amendment merely extended the Act's protections to all vessels within the court's admiralty jurisdiction, including those that were not being operated in the tidewaters. The amendment did not expand the Act's application to waters which are non-navigable for purposes of admiralty and maritime jurisdiction.

Thus, prior to its amendment the Limitation of Liability Act and admiralty jurisdiction were not coextensive. Admiralty jurisdiction extended to all navigable waters whereas the Limitation of Liability Act did not extend to rivers, lakes and inland navigation. The amendment of the Act merely extended its reach to the fullest extent of admiralty jurisdiction.

In an early case interpreting the Limitation of Liability Act the Supreme Court had this to say: "The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law." *Butler v. Boston Steamship Co.*, 130 U.S. 527, 555 (1889) (citations omitted).

> It being clear, then, that the law of limited liability of shipowners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends

> wherever public navigation extends — on the sea and the great inland lakes, and the navigable waters connecting therewith.

Id. at 557 (citations omitted).

Accordingly, courts have consistently limited the application of the Limitation of Liability Act to waters encompassed within the territorial domain of admiralty and maritime law.

In order to be within the reach of admiralty and maritime law, as previously noted, the waters must be navigable. Because the reach of the Limitation of Liability Act is coextensive with admiralty we will use the same definition for navigable as that which was used for admiralty jurisdiction purposes. Thus, our conclusion that Lake of the Ozarks is not navigable for admiralty jurisdiction purposes compels a conclusion that it is also not navigable for purposes of the Limitation of Liability Act.

In *Sisson*, the Seventh Circuit also interpreted the Limitation of Liability Act's territorial application to be limited to the territorial reach of admiralty jurisdiction. In addition, in the wake of the Supreme Court's recent decisions applying a nexus requirement for admiralty jurisdiction, the Seventh Circuit held that the "Limitation of Liability Act will be cognizable in admiralty only when the underlying tort has a relationship to traditional maritime activity." *In the Matter of Sisson*, 867 F.2d at 351 (footnote omitted). Thus, the Seventh Circuit has interpreted the Limitations of Liability Act to only apply to cases which meet both the locality and nexus tests under admiralty jurisdiction. Nevertheless, because the instant case fails the locality requirement we need not reach the issue decided in *Sisson*, *i.e.*, whether the nexus requirement applies to a Limitation of Liability Act proceeding. We note, however, that if the Limitation of Liability Act application is truly co-extensive with admiralty jurisdiction such a nexus requirement would seem to apply.

Three Buoys argues that the Limitation of Liability Act is an act of Congress passed pursuant to its powers to regulate interstate commerce. Therefore, Three Buoys maintains, the definition of navigable for purposes of the Limitation of Liability Act should not be the restrictive

definition used in the context of admiralty jurisdiction but rather the broad definition of navigable used in the context of the commerce clause.

As already noted, navigable has been defined in several contexts and courts must be fully aware of the purpose for which the concept was invoked in particular cases. In *Livingston*, we recognized the Supreme Court's admonition "that Congress' regulatory authority under the commerce clause is historically very broad, and the expansive definitions of navigability developed in commerce clause cases are not really appropriate in other contexts where the actual capability of a stream to support navigation is critical." *Livingston v. United States*, 627 F.2d at 169 (citing *Kaiser Aetna v. United States*, 444 U.S. at 173). In *Livingston* this court declined to invoke the broad definition of navigability often used in the commerce clause context. The *Livingston* court emphasized that "a functional analysis of 'navigability' should be employed "so that the limits of governmental authority are determined in accordance with the purposes it serves." *Livingston v. United States*, 627 F.2d at 169.

Accordingly, we hold that in the instant case the territorial application of the Limitation of Liability Act is limited to waters that are navigable in fact for purposes of admiralty jurisdiction. Because, as we have already discussed, the Lake of the Ozarks is not a navigable waterway for purposes of admiralty jurisdiction Three Buoys would not be entitled to the protections afforded under the Limitation of Liability Act.

III. CONCLUSION

We affirm the district court's dismissal of Three Buoys' complaint under the Limitation of Liability Act. Although the district court concluded that it had subject matter jurisdiction, we conclude that it did not.

The district court correctly noted that jurisdictions was not proper under its admiralty jurisdiction because the collision at issue did not occur on navigable waters. We believe that in the absence of admiralty

jurisdiction the district court lacked subject matter jurisdiction over this case because the Limitation of Liability Act does not provide an independent source of jurisdiction and this case did not "arise under" federal law for purposes of general federal question jurisdiction. The complaint, therefore, should be dismissed for want of jurisdiction and it is so ordered.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436EM

JUDGMENT

(Filed July 5, 1989)

In the Matter of the Complaint of Three Buoys Houseboat Vacations U.S.A., Ltd., etc.,

Appellant,

v.

Harvey G. Morts, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

July 5, 1989

A true Copy:

Attest:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.
Mandate Issued: 10/18/89

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436EM

In the Matter of the Complaint of Three Buoys Houseboat Vacations U.S.A. Ltd., as owners of one 1977 Chriscraft 20' fiberglass vessel, Vessel No. MO-3136-AT, for exoneration from or limitation of liability,

Appellant,

vs.

Harvey G. Morts, et al.,

Appellees.

Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge McMillian voted to grant the petition for rehearing en banc.

Petition for rehearing by the panel is also denied.

October 4, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-242A(1)

In the Matter of the:

Complaint of Three Buoys Houseboat Vacations U.S.A., Ltd., etc.

ORDER

(Filed June 27, 1988)

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that the motions of claimants Harvey G. Morts and Karron Lee Webb, et al. to dismiss the complaint of Three Buoys Houseboat Vacations U.S.A., Ltd. be and are granted.

IT IS FURTHER ORDERED that, to the extent that plaintiff seeks to invoke the Court's admiralty jurisdiction, plaintiff's complaint be and is dismissed for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that, to the extent that plaintiff seeks to invoke the Court's general federal question or commerce clause jurisdiction, plaintiff's complaint be and is dismissed for failure to state a claim under the Limitation of Liability Act.

IT IS FURTHER ORDERED that the injunction order entered in this action on January 26, 1988 be and is dissolved and declared to be of no effect.

IT IS FURTHER ORDERED that plaintiff's motion for an order noting defaults be and is dismissed as moot.

/s/ John Nangle
United States District Judge

Dated: June 27, 1988

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-141A(1)

In the Matter of the:
Complaint of Three Buoys Houseboat Vacations
U.S.A., Ltd., etc.

MEMORANDUM

This matter is now before the Court on claimants' motions to dismiss plaintiff's complaint for lack of subject matter jurisdiction. Two jurisdictional questions are presented in this case: (1) whether Lake of the Ozarks, a reservoir formed by Bagnell Dam and located entirely within the State of Missouri, is a "navigable" body of water within the Court's federal admiralty jurisdiction; (2) whether an action pursuant to the Limitation of Liability Act is within the Court's federal question or commerce clause jurisdiction.

I. Background.

Plaintiff Three Buoys Houseboat Vacations U.S.A., Ltd. (Three Buoys) is a Missouri corporation engaged in the business of chartering houseboats on Lake of the Ozarks. Lake of the Ozarks is a body of water in central Missouri which was created by impounding the Osage River by construction of the Bagnell Dam, a dam with no locks to allow passage of vessels. This case arises from a collision between a twenty-foot fiberglass vessel operated by an employee of Three Buoys and the Kantafordit houseboat. The collision occurred at approximately 2:00 a.m. on August 2, 1987 on Lake of the Ozarks. As a result of the collision, two passengers on the houseboat were killed, three other passengers on the houseboat and plaintiff's employee sustained personal injuries, plaintiff's vessel sank and the houseboat sustained property damages. Several wrongful death, personal injury, and property damage claims have been filed in state court against Three

Buoys and its vessel. (Plaintiff's Complaint, ¶ 10; Plaintiff's Affidavit of Mailing Notice filed March 1, 1988).

Three Buoys filed the present complaint for exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. §§ 181 *et seq.*, to limit its liability in connection with the collision that occurred on Lake of the Ozarks. Plaintiff's complaint alleges that the Court has admiralty jurisdiction pursuant to 28 U.S.C. § 1333, or in the alternative, has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337. Plaintiff posted security and requested an order restraining and enjoining the prosecution of all suits or legal proceedings against it and issuing notice to claimants directing them to file their claims in federal court. *See* 46 U.S.C. § 185. On January 26, 1988, this Court issued a restraining order enjoining suits and issued notice to all claimants directing the filing of claims. Claimants move to dismiss plaintiff's complaint on the ground that Lake of the Ozarks is not a "navigable" body of water within the admiralty jurisdiction of this Court.

II. Admiralty Jurisdiction.

The admiralty jurisdiction of the federal district court is set forth in 28 U.S.C. § 1333, which provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Congress extended admiralty and maritime jurisdiction to cases arising from personal injury or property damage sustained on navigable waters in the Admiralty Jurisdiction Extension Act, which provides in pertinent part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water,

> notwithstanding that such damage or injury be done or consummated on land.

46 U.S.C. § 740.

Under the Limitation of Liability Act, a ship owner's liability for personal injury or property damage is limited to the value of the vessel and its pending freight when the loss is incurred without the owner's privity or knowledge. 46 U.S.C. § 183(a);[1] *Valley Line Co. v. Ryan*, 771 F.2d 366, 369 (8th Cir. 1985). This limitation of liability extends to "all seagoing vessels" and to "all vessels used on lakes or rivers or inland navigation." 46 U.S.C. § 188.[2] The Limitation of Liability Act was enacted to encourage investments in shipbuilding and to provide an opportunity for the complete disposition of claims against a vessel and its owner. *Just v. Chambers*, 312 U.S. 383, 385-386 (1941).

The determination of whether admiralty jurisdiction exists over a maritime tort involves a two-fold inquiry. First, the tort must occur on "navigable" waters. Second, the tort must have a "sufficient nexus" to a traditional maritime activity. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 671-674 (1982); *Complaint of Paradise Holdings*, 619 F. Supp. 21, 22-23 (C.D. Cal. 1984), *aff d*, 795 F.2d 756 (9th Cir.), *cert. denied*, 107 S. Ct. 649 (1986).

The Eighth Circuit has held that "navigability", for purposes of admiralty jurisdiction is "properly limited" to waters which have "a present capability . . . to sustain commercial shipping." *Livingston v. United States*, 627 F.2d 165, 170 (8th Cir. 1980), *cert. denied*, 450 U.S.

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[1] 46 U.S.C. § 183(a) provides in pertinent part:

> The liability of the owner of any vessel . . . for any loss, damage, or injury by collision . . . incurred, without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

[2] The Limitation of Liability Act has been supplemented by Admiralty Rules which prescribe procedural requirements for limitation proceedings. *See* Rules A and F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure.

914 (1981). *See also Land and Lake Tours, Inc. v. Lewis*, 738 F.2d 961, 963 n. 3 (8th Cir.), *cert. denied*, 469 U.S. 1038 (1984) ("present navigability in fact is the linchpin of admiralty jurisdiction"); *Edwards v. Hurtel*, 717 F.2d 1204, 1205 (8th Cir. 1983) (admiralty jurisdiction "turns on contemporary navigability in fact"). In *Livingston*, the Eighth Circuit held that no admiralty jurisdiction existed over an action arising from a death on the Norfolk River which occurred after construction of a hydroelectric dam had closed the river to commercial activity. The court found that a history of commercial activity on the Norfolk River was not determinative of admiralty jurisdiction and that the closing of the river to commercial traffic eliminated admiralty jurisdiction over the river. *Id.* at 169-170. The court explained that "absent some present or potential commercial activity, there is no ascertainable federal interest that justifies frustrating the legitimate interests of the states in providing a forum and applying their law to regulate conduct within their borders." *Id.* at 170 (*citing Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975)).

In *Cooper v. United States*, 500 F. Supp. 191 (W.D. Mo. 1980), the United States District Court for the Western District of Missouri applied the *Livingston* decision to an action arising from the death of an individual which occurred as a result of a collision of two motorboats on Lake of the Ozarks. The Court held that Lake of the Ozarks was not within the Court's admiralty jurisdiction. *Cooper*, 500 F. Supp. at 193.[3]

Plaintiff argues that Lake of the Ozark is a "navigable" body of water within the admiralty jurisdiction of this Court. Plaintiff points out that at the time that Lake of the Ozarks was construed by the Bagnell Dam, the Osage River was a navigable stream. Plaintiff relies upon *In re Wood's petition*, 145 F. Supp. 848 (W.D. Mo. 1956), *aff'd*

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[3] In *Cooper*, plaintiffs apparently conceded that the *Livingston* decision rendered Lake of the Ozarks beyond the court's admiralty jurisdiction. However, the court also stated that it was "convinced that Lake of the Ozarks is not navigable for purposes of admiralty jurisdiction." *Cooper*, 500 F. Supp. at 193.

sub nom. Loc-Wood Boat and Motors v. Rockwell, 245 F.2d 306 (8th Cir. 1957). In *Wood's Petition*, the district court held, based upon the historical navigability of the Osage River, that Lake of the Ozarks was a "navigable" body of water within the admiralty jurisdiction of the court. The decision was affirmed on appeal.

Plaintiff's reliance upon the historical navigability of the Osage River and the *Loc-Wood Board and Motors* decision is unavailing. In *Livingston*, the Eighth Circuit specifically rejected reliance upon historical navigability as a basis for establishing present admiralty jurisdiction. *Livingston*, 627 F.2d at 170. The *Livingston* court pointed out that in the *Loc-Wood Boat and Motors* decision the parties did not challenge the appropriateness of admiralty jurisdiction and the court was not "squarely faced with the question of whether current navigability in fact is required for admiralty jurisdiction." *Livingston*, 627 F.2d at 168 and n. 4. Finally, the *Livingston* court unequivocally stated that "[n]otwithstanding any expressions to the contrary in prior decisions of this court, federal admiralty jurisdiction turns on contemporary navigability in fact," not historical navigability. *Id.* at 170.

Plaintiff relies upon several regulatory and administrative determinations of navigability to support its contention that Lake of the Ozarks is a "navigable" body of water within the admiralty jurisdiction of this Court. First, plaintiff relies upon an April 9, 1981 order of the Federal Energy Regulatory Commission (FERC) issuing a license to Union Electric for the operation of the Osage project, which states that the project, Bagnell Dam, is located on the Osage River, "a navigable water of the United States." (*See Plaintiff's* Reply Memorandum, Exhibit A). Under the Federal Power Act, the FERC has authority to issue licenses for the construction of dams and other works. *See* 42 U.S.C. § 7172. Plaintiff also argues that Congress' declaration that a portion of the Osage River, at a point well upstream from Lake of the Ozarks, is not navigable, *see* 33 U.S.C. § 41, means that the portion of the Osage River containing Lake of the Ozarks is navigable. Plaintiff contends that the continued issuance of permits by the Army Corps of Engineers for construction of obstructions on Lake of the Ozarks (*see* Plaintiff's Reply, Exhibit B), also demonstrates that Lake

of the Ozarks is a "navigable" water of the United States within the meaning of 33 C.F.R. § 328.3 and 33 C.F.R. § 329.4.[4] Finally, plaintiff argues that the Coast Guard inspection of excursion vessels which carry passengers for hire on Lake of the Ozarks is further evidence of the navigability of Lake of the Ozarks.

Definitions of "navigability" for administrative or regulatory purposes are separate and distinct from judicial definitions of navigability for purposes of admiralty jurisdiction. *See Reynolds v. Bradley*, 644 F. Supp. 42, 45 (N.D.N.Y. 1986); *Wilder v. Placid Oil Co.*, 611 F. SUpp. 841, 844 (W.D. La. 1985). In *Livingston*, the Eighth Circuit cautioned that determinations of navigability must be viewed in light of the purposes for which the determinations were made, and stated the following:

> The Supreme Court has recently observed that precedent in this area must be evaluated carefully in light of " 'the *purpose* for which the concept of "navigability" was involved in a particular case'." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 . . . The Court in that case identified four separate purposes underlying the definitions of "navigability"; to delimit the boundaries of the navigational servitude; to define the scope of Congress' regula-

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[4] These regulations define "waters of the United States" and "navigable waters" for purposes of defining the authority of the Army Corps of Engineers. Section 328.3 defines "waters of the United States" in pertinent part as follows:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

Section 329.4 defines "navigable waters" as follows:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies a laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.

> tory authority under the commerce clause; to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Act of 1889; and to establish the limits of federal admiralty jurisdiction. Each of these areas of the law might well require a different definition of "navigability."
>
> In *Kaiser Aetna*, the Court noted specifically that Congress' regulatory authority under the commerce clause is historically very broad, and the expansive definitions of navigability developed in commerce clause cases are not really appropriate in other contexts where the actual capability of a stream to support navigation is critical . . . What is required in those contexts is a functional analysis of "navigability," so that the limits of governmental authority are determined in accordance with the purposes its serves.

Livingston, 627 F.2d 165, 169 (8th Cir. 1980) (citations omitted).

The administrative and regulatory determinations relied upon by plaintiff define the scope of the Army Corps of Engineers' authority over certain bodies of water and the scope of Congress' regulatory authority under the commerce clause, not the scope of judicial authority to exercise admiralty jurisdiction. Under a "functional analysis", the Court finds that the plaintiff has failed to establish that Lake of the Ozarks is presently navigable. *See Livingston*, 627 F.2d at 169, 170. The lake is impounded by the Bagnell Dam, the dam has no locks to allow passage of boats from the Osage River into the lake, and the lake lies wholly within the State of Missouri. The Court concludes that Lake of the Ozarks is presently incapable of sustaining commercial shipping and is not "navigable" for purposes of admiralty jurisdiction, and thus, is not within the admiralty jurisdiction of this Court.[5]

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[5] Because the Court has concluded that the accident did not occur on "navigable" waters, it is not necessary to reach the issue of whether the tort had a "sufficient nexus" to a traditional maritime activity. *See Foremost Insurance Co.*, 457 U.S. 668 (1982).

III. Alternative Bases of Jurisdiction.

Plaintiff argues that even if no admiralty jurisdiction exists over the limitation proceedings, the Court has federal question or commerce clause jurisdiction over this cause of action pursuant to 28 U.S.C. §§ 1331, 1337.

Plaintiff contends that the Limitation of Liability Act, an Act regulating commerce, provides its own basis for jurisdiction. Several courts have rejected the contention that the Limitation of Liability Act provides a basis for jurisdiction regardless of the navigability of the body of water involved. *See Marroni v. Matey*, 492 F. Supp. 340, 343 (E.D. Pa. 1980); *In re Builders Supply Co.*, 278 F. SUpp. 254, 256-57 (N.D. Iowa 1968); *In re Howser's Petition*, 227 F. Supp. 81, 85-86 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F. SUpp. 411, 413-14 (N.D.N.Y. 1960). These courts emphasized that the scope of the Limited Liability Act was "co-extensive" with the scope of admiralty jurisdiction. However, none of these cases addressed the precise issue presented in the present case concerning whether an action pursuant to the Limitation of Liability Act arises under federal law or an Act of Congress regulating commerce and, thus, is within the Court's § 1331 or § 1337 jurisdiction.

The power of Congress to enact the Limitation of Liability Act is "derived both from the power to regulate commerce and from the clause in the Constitution extending judicial power to 'all cases of admiralty and maritime jurisdiction'." *Old Dominion S. S. Co. v. Gilmore* (The Hamilton), 207 U.S. 398, 404 (1907); 3 *Benedict on Admiralty* § 3, p. 1-29 (7th Ed. 1986). To base jurisdiction upon § 1337, the commerce clause need not be the exclusive source of federal power involved in the statute, it need only be a significant source. *Murphy v. Colonial Federal Savings & Loan Ass'n*, 388 F.2d 609, 615 (2d Cir. 1967). *See generally* 13B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3574 (1984). The courts have held that suits under the Merchant Marine Act of 1920 (Jones Act), 46 U.S.C. § 688, which was enacted pursuant to Congress' power to regulate commerce and power to make laws necessary and proper to carry out the Court's power over admiralty and maritime cases, arise under an Act regulat-

ing commerce and are within the court's section 1337 jurisdiction. *See Ballard v. Moore-McCormick Lines, Inc.*, 285 F. Supp. 290, 295-96 (S.D.N.Y. 1968); *Richardson v. St. Charles-St. John the Baptist Bridge & Ferry authority*, 274 F. Supp. 764, 767-69 (E.D. La. 1967). The courts have likewise held that other shipping laws are within the § 1337 jurisdiction of the federal courts. *See Maritime Service Corp. v. Sweet Brokerage De Puerto Rico, Inc.*, 537 F.2d 560 (1st Cir. 1976) (Shipping and Intercoastal Shipping Acts); *Crispin Co. v. Lykes B ros. Steamship Co.*, 134 F. Supp. 704 (S.D. Tex. 1955) (Carriage of Goods by Sea Act); *see also Land and Lake Tours, Inc. v. Lewis*, 738 F.2d 961 (8th Cir.), *cert. denied*, 469 U.S. 1038 (1984) (Section 1331 jurisdiction exists over Steamboat Inspection Act claim).

The existence of commerce clause or federal question jurisdiction does not turn upon the present navigability of a body of water. *See Land and Lake Tours, Inc. v. Lewis*, 738 F.2d 961 (8th Cir.), *cert. denied*, 469 U.S. 1038 (1984). In *Land and Lake Tours, Inc.*, the Eighth Circuit held that federal question jurisdiction existed over a lake which was not presently navigable in fact, but which was navigable in its "natural and ordinary condition.: *Id.* at 964. Although Lake of the Ozarks is not currently navigable for purposes of admiralty jurisdiction, the portion of the Osage River containing the lake was navigable in its natural and ordinary condition before it was obstructed by the Bagnell Dam to form Lake of the Ozarks. Therefore, notwithstanding the lack of admiralty jurisdiction, this Court has jurisdiction, pursuant to 28 U.S.C. §§ 1331 and 1337, over this limitation proceeding which arises under an Act of Congress regulating commerce.

Having concluded that federal question jurisdiction exists over this limitation action, the Court must now determine whether the Limitation of Liability Act applies to the present case which involves a collision between vessels on on-navigable waters. Congress enacted the Limitation of Liability Act in 1851 to encourage investment in the American maritime industry. *See Matter of Sisson*, 668 F. Supp. 1196, 1198 (N.D. Ill. 1987). The focus of the statute was entirely upon commercial shipping. *See Complaint of Shaw*, 668 F. Supp. 524, 526 (S.D. W.Va. 1987). Congress recognized that many foreign countries involved in

maritime commerce maintained laws limiting the tort liability of ship owners. *Matter of Sisson*, 668 F. Supp. at 1198. Without limited liability, the American merchant marine was at a competitive disadvantage in the maritime world market. The Limitation of Liability was designed to place American maritime trade on an "equal footing" with the competing European maritime industry which already enjoyed limited liability, not to protect commerce on inland lakes. *In re Stephens*, 341 F. Supp. 1404, 1405-06 (N.D. Ga. 1965).

Plaintiff argues that the Limitation of Liability Act is not expressly limited, by its terms, to vessels on "navigable" waters, but is applicable to "all vessels" on "lakes or rivers or inland navigation." 46 U.S.C. § 188. Section 188 was amended in 1886 to make the Limitation of Liability Act applicable to "all vessels used on lakes or rivers or inland navigation." 46 U.S.C. § 188; G. Gilmore & C. Black, Jr., *The Law of Admiralty*, 843-44 (2d Ed. 1975). The earlier version of section 188 had excluded "owners of any canal boat, barger or lighter . . . used in rivers or inland navigation" from the protection of the Act. Gilmore & Black at 843-44. The amendment was designed to make the Act applicable to all vessels regardless of the purposes for which they were used, *see Petition of Liebler*, 19 F. SUpp. 829, 832 (W.D.N.Y. 1937), not to extend the Act to vessels on non-navigable waters. Professors Gilmore and Black have observed that the Limitation of Liability Act only applies when the "structure seeking the benefit of the Limitation Act qualifies as a 'vessel' " within the meaning of section 188 and "the event giving rise to the claims occurred on navigable waters within the Admiralty jurisdiction" of the court. *Id.*

The Court concludes that application of the Limitation of Liability Act is properly limited to incident occurring on waters which are "navigable" for purposes of admiralty jurisdiction and does not extend to a collision on non-navigable waters. Exercise of federal jurisdiction over this collision between two vessels on waters which lie wholly within the State of Missouri and which are closed to commercial shipping would not advance the purposes underlying the Limitation of Liability Act and would undermine the interests of the state in providing a forum for claims arising out of conduct occurring on its

internal waterways. If application of the Limitation of Liability Act was not confined to "navigable" waters, then every boat owner on every inland lake with no connection with maritime commerce would be within the reach of the limitation statute. Congress did not intend this result. Therefore, to the extent that plaintiff seeks to invoke the Court's general federal question or commerce clause jurisdiction, plaintiff's complaint is dismissed for failure to state a claim under the Limitation of Liability Act. *See* Fed. R. Civ. P. 12(b)(6); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 at 593 (1969).

/s/ John Nangle
United States District Judge

Dated: June 27, 1988

APPENDIX G

Constitution of the United States

Article I, Section 8, Clause 3. Regulation of Commerce

[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article I, Section 8, Clause 9. Creation of Tribunals Inferior to Supreme Court

[The Congress shall have Power] To constitute Tribunals inferior to the Supreme Court;

Article I, Section 8, Clause 18. Enactment of Laws for Execution of Governmental Powers

[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article III, Section 2, Clause 1. Jurisdiction of Courts

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to all Cases of admiralty and maritime Jurisdiction; * * *

Statutes

1 U.S.C. § 3. "Vessel" as including all means of water transportation

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

28 U.S.C. § 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: * * *.

33 U.S.C. § 41. Osage River, Missouri

The Osage River in the State of Missouri above the point where the south line of sections 15 and 16 in township 40 north, of range 22 west, of the fifth principal meridian, and in the county of Benton, State of Missouri, crosses said river, is declared not to be navigable stream, and shall be so treated by the Secretary of the Army and by all other authorities.

33 U.S.C. § 2001. Application (Rule 1)

(a) United States inland waters and Canadian waters of Great Lakes

These Rules apply to all vessels upon the inland waters of the United States * * *.

46 U.S.C. § 183. Amount of Liability; Loss of life or bodily injury; privited imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. § 188. Limitation of liability of owners applied to all vessels

Except as otherwise specifically provided therein, the provisions of section 182, 183, 183b-187, and 189 of this title shall apply to all

seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters.

46 U.S.C. App. § 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water * * *.

Procedural Rules

Fed. R. Civ. P. Supp. Rule A. Scope of Rules

These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

* * *

(4) Actions for exoneration from or limitation of liability.

* * *

The general rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

Fed. R. Civ. P. Supp. Rule F. Limitation of Liability

(1) Time for filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision

(9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for cost s and, if the plaintiff elects to give security, for interest the rate of 6 percent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) Notice to Claimants. Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) Information to be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for

each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether the property loss, property damage, death, personal injury, etc., and (d) the amount thereof.

(7) **Insufficiency of Fund or Security.** Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) **Objections to Claims: Distribution of Fund.** Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) **Venue; Transfer.** The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced

in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.